NO. 22488

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

R. MILO GILBERT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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TABLE OF AUTHORITIES CITED

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I

JURISDICTIONAL STATEMENT

This appeal is from an order of the United States District Court for the Central District of California on September 18, 1967, denying appellant's motion pursuant to Rule 35 of the Federal Rules of Criminal Procedure to correct a sentence imposed on him on September 23, 1963. The jurisdiction of the District Court was predicated upon Rule 35, Federal Rules of Criminal Procedure. This Court has jurisdiction under Title 28, United States Code, Sections 1291 and 1294.

II

RULE INVOLVED

Rule 35, Federal Rules of Criminal Procedure, provides as follows:

> "The court may correct an illegal sentence at any time . . . ."

III

STATEMENT OF THE CASE

On January 22, 1960, before United States District Judge Leon J. Yankwich in the United States District Court for the Southern District of California, Central Division, the appellant was convicted on thirty-one counts for violations of Title 26, United States Code, Section 7206(2) and Title 18, United States Code, Section 1001. It was the judgment of the Court that the appellant be sentenced to a term of one year and one day on each count with the sentences to run consecutively, making a total sentence of thirty-one years and thirty-one days [C. T. 2]. 1/

The Court of Appeals for the Ninth Circuit reversed twenty-nine counts of the judgment, and the United States Supreme Court reversed the remaining two counts. Thereafter, in 1963, before United States District Judge, Charles H. Carr, the appellant was

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1/ "C. T." refers to Clerk's Transcript.

tried again on the same thirty-one counts charging violations of Title 26, United States Code, Section 7206(2) and Title 18, United States Code, Section 1001. On September 23, 1963, the appellant was convicted on twelve counts charging violations of Title 26, United States Code, Section 7206(2), and on three counts charging violations of Title 18, United States Code, Section 1001. It was the judgment of the Court that the appellant be sentenced to a term of three years on each of the twelve counts charging violations of Title 26, United States Code, Section 7206(2), and five years on each of the three counts charging violations of Title 18, United States Code, Section 1001. It was the order of the Court that the sentences on all fifteen counts run concurrently, making a total imprisonment of five years [C. T. 3].

On August 31, 1967, the appellant filed a motion with the United States District Court pursuant to Rule 35 of the Federal Rules of Criminal Procedures alleging that the sentence of the Court on September 23, 1963, was illegal to the extent it exceed the term of one year and one day as imposed on each count after the initial trial [C. T. 4]. On September 18, 1967, the District Court denied appellant's motion [C. T. 24]. On September 27, 1967, the appellant lodged with the District Court a notice of appeal.

IV

ISSUES PRESENTED

A. Whether the trial court may impose a greater sentence following retrial for the same offense.

B. Whether the trial court in fact imposed a greater sentence after retrial.

V

ARGUMENT

A. THE TRIAL COURT MAY IMPOSE A GREATER SENTENCE FOLLOWING RETRIAL FOR THE SAME OFFENSE.

Whether a greater sentence can be imposed following a retrial for the same offense appears to be an issue of first impression in this Circuit.

The appellant has cited in his brief several cases from other Circuits which purport to disallow increasing punishment after retrial for the same offense.

Oksanen v. United States, 362 F. 2d 74 (8th Cir. 1966), cert. denied 385 U.S. 840;

United States v. Sacco, 367 F. 2d 368 (2nd Cir. 1966);

United States v. Adams, 362 F. 2d 210 (6th Cir. 1966).

However, on close examination of each of these cases it is revealed that no retrial after a reversal of convictions was involved. In Oksanen, the defendant was successful in having his sentence set aside because of the lack of presence of counsel at the time of sentencing. At the time of resentencing, the defendant had already

served the sentence originally imposed. However, the court imposed an additional sentence of three years probation. The Court of Appeals for the Eighth Circuit held the additional sentence to be double jeopardy and therefore, unlawful.

In Sacco, the defendant was sentenced to five years on Count One and seven years on Count Two of a two-count indictment, the sentences to run concurrently. The maximum permissible sentence on Count One was ten years, and on Count Two, five years. After the defendant had started serving his sentence, the trial court sought to transpose the sentences on the two counts. The Court of Appeals for the Second Circuit held that since the defendant had already started serving a valid sentence under Count One, it would be double jeopardy to increase this sentence.

In Adams, the defendant was sentenced to ten years on Count Three and one year on each of the remaining four counts of a five-count indictment, the sentences to run concurrently. The maximum permissible sentence on Count Three was five years. After the defendant began serving his sentence, the court reduced the sentence on Count Three to one year and increased the sentence on Count Two to ten years. The Court of Appeals for the Sixth Circuit held that the increase of the valid sentence on Count Two constituted double jeopardy.

The appellant also cites United States v. Hough, 157 F. Supp. 771 (D. C. S. D. Calif. 1957) in support of his position. In Hough, the District Court merely said that if the initial sentence is valid, increasing the sentence on resentence is unlawful and void.

In none of the above-mentioned cases cited by the appellant is the factual situation anywhere near similar to the facts in the case at bar. In none of these cases was there a reversal of the conviction and a retrial on the same offenses before the increased sentence was imposed.

The appellant also relies upon Green v. United States, 355 U.S. 184 (1957) in contending that a sentence is illegal where it is more severe in the second trial than in the first trial. However, the factual situation in the Green case is also quite distinct from the facts in the instant case. In the first trial in the Green case the jury was authorized to find the defendant guilty of first or second degree murder. The jury found the defendant guilty of second degree murder and upon the defendant's appeal, the case was reversed and remanded. At the subsequent new trial, the defendant was found guilty of first degree murder. On appeal, the United States Supreme Court held that after the first trial there was an implicit acquittal of the defendant as to first degree murder, and therefore the prosecution for first degree murder in the second trial constituted double jeopardy. First degree murder and second degree murder are two distinct crimes. In the instant case, however, the offenses for which the defendant was convicted in the second trial were identical to those in the first trial.

The case of Stroud v. United States, 251 U.S. 15 (1919) clearly supports the imposition of a greater punishment following retrial for the same offense. In the Stroud case the defendant was found guilty of first degree murder and sentenced to life

imprisonment at the first trial. Upon the defendant's appeal, the conviction was reversed and the defendant was retried for first degree murder. Upon conviction at the second trial the death penalty was imposed upon the defendant. The Supreme Court held, upon appeal, that the defendant, when retried for the same offense, could receive the death penalty sentence and this did not constitute double jeopardy. Therefore, Stroud clearly holds that on retrial of the defendant for the same offense a greater sentence can be imposed.

In further support of the appellee's contention that a greater punishment can be imposed following retrial for the same offense is United States v. Russell, 378 F. 2d 808 (3rd Cir. 1967). In Russell, the Court differs with the contrary holding in Marano v. United States, 374 F. 2d 583 (1st Cir. 1967), to the effect that a defendant "should not have to fear even the possibility that his exercise of his right to appeal will result in the imposition of a direct penalty for so doing." The court in Russell states:

> "We differ with the court's opinion for the reason that we cannot properly speculate that the court certainly will increase the sentence, after a new trial. To so hold would seem to trespass the integrity of the trial judge who, upon hearing all the evidence, with the whole panorama of defendant's crime laid out before him, conscientiously passes sentence in accordance therewith. . . . The sentence thus imposed by the trial judge cannot, in

any sense, be said to be for [the defendant's] appealing, unless we again attribute to him a base motive - penalizing [the defendant] for his appeal, conduct unworthy of the name of judge - rather than for his weighing and evaluating the measure defendant's crime and passing sentence thereon. . . ."

In Russell, the court further states:

"In Robinson v. Johnston, D.C., 50 F. Supp. 774, one Robinson, a prisoner at Alcatraz, filed a petition for habeas corpus in 1939, alleging that he had not been represented by legal counsel and was sentenced under the Lindberg Act for the crime of kidnapping. A new trial was granted, counsel obtained for him, the jury convicted him and the court sentenced him to death. The sentence was affirmed by the Circuit Court of Appeals, Robinson v. United States, 144 F.2d 392, 393, and by the Supreme Court of the United States at 324 U.S. 282, 65 S. Ct. 666, 89 L.Ed. 629. Undoubtedly, it would therefore seem to be the rule in the federal system that a trial judge, when a new trial is ordered, may impose a sentence greater than one he had earlier vacated, and that it is unnecessary to articulate the reason for any differentiation in the term of the sentence."

The appellee contends that Stroud v. United States is dispositive of this issue.

B. ASSUMING ARGUENDO, THE COURT MAY NOT INCREASE THE SENTENCE FOLLOWING RETRIAL FOR THE SAME OFFENSE, THE SENTENCE IMPOSED BY THE TRIAL COURT AFTER THE SECOND TRIAL WAS NOT GREATER THAN THE SENTENCE IMPOSED AFTER THE FIRST TRIAL.

The appellant's allegation that his sentence was increased after the second trial is defeated by the facts. At the first trial appellant was convicted on thirty-one counts and was sentenced for a term of imprisonment of one year and one day on each count, with the sentences to run consecutively. Thus, the appellant was sentenced to a total term of imprisonment of thirty-one years and thirty-one days. After the second trial, the appellant was sentenced to a term of imprisonment of three years on each of twelve counts and five years on each of three counts, with the sentences on all counts to run concurrently. Therefore, the total sentence imposed after the second trial was for a maximum term of imprisonment of five years.

The appellant contends that for the purposes of sentencing, the various counts of the indictment may not be treated together. To extend this argument to its logical conclusion, the appellant is in effect saying that the trial court may not impose concurrent sentences. This is obviously not the law, nor would the appellant

want it to be. If such were the law, the appellant would now be asking, in effect, that his original sentence of thirty-one years and thirty-one days be corrected to fifteen years and fifteen days.

Although no case decided by the Court of Appeals for any Circuit has been found that discusses the point, it is apparently the law that a sentence imposed at a single session upon a multiple count indictment is a single judicial act, not a succession of separate judgments.

United States v. Gebhart, 90 F. Supp. 509
(D.C. Neb. 1950).

That the trial court need not treat the various counts of the indictment separately at the time of sentencing is evidenced further by the fact that the court may impose a general sentence covering all counts, rather than an individual sentence for each count, although it is highly desirable that the court deal separately with each count.

Ray v. United States, 372 F.2d 80
(9th Cir. 1967).

VI

CONCLUSION

For the reasons stated herein, the District Court's order of September 18, 1967, denying appellant's motion to correct sentence, should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ James E. Shekoyan
JAMES E. SHEKOYAN